No. 12,362

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

M. L. TOWNSEND,

Respondent.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

Cases

Statutes

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Comes now M. L. Townsend, respondent in the above enittled matter and respectfully petitions the Court to set aside its opinion heretofore issued on September 11, 1950, and to grant a new hearing in this matter and as reasons therefore respectfully shows:

I.

That the aforementioned opinion, issued September 11, 1950, granted a petition of the National Labor Relations Board to enforce an order previously entered by that body against the respondent here.

II.

The Court in reaching its decision and entering its opinion appears to have overlooked or given improper con-

sideration to a determinative factor and point of law.[1] After the Trial Examiner issued his Intermediate Report in which it was found that the Board did not have jurisdiction over this respondent, pertinent provisions of Section 10 (c) of the National Labor Relations Act (29 U. S. C. A., Sec. 160(c)), became operative and dispositive of the entire matter. In part. Section 10(c) is as follows:

> ". . . In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order *shall* become the order of the Board and become effective as therein prescribed." (Emphasis supplied.)

Section 8(a) and (b) of the Administrative Procedure Act, 60 Stat. 237, is to the same effect.[2, 3]

The record reveals and the Board admits that the General Counsel did not file exceptions to the Intermediate Report of the Trial Examiner [I. R. 1-5] and hence the quoted portion of Section 10(c) became operative and conclusively disposes of this whole case. The position that

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[1]For the convenience of the court and counsel, Respondent in his references to the findings and proceedings will use the same designations as used by the Board in its brief, *i.e.,* Intermediate Report as I. R. .....; Decision and Order Remanding Case to Trial Examiner as D. .....; Supplemental Intermedite Report as S. I. R. .....; and the Order of the Board as O. .....

[2]The Board did not issue proposed findings as required by the Administrative Procedure Act.

[3]See appendix, page 5, Respondent's brief herein.

the Board is bound to obey the statutory mandate cannot be successfully challenged and the Board must perform its functions according to the mandates of law. Since no exceptions were filed to the Intermediate Report and Recommended Order, by the General Counsel or any other party, such Intermediate Report and Recommended Order became, by operation of law, the Order of the Board and the Board is and was compelled by the statute to enter the Trial Examiner's Intermediate Report and Recommended Order as the Order of the Board.

This mandated duty is not only provided for in the National Labor Relations Act (Sec. 10(c)), it is also required by Section 8(a) of the Administrative Procedure Act (see above). This latter statute provides that where the initial decision is made by a subordinate officer and there is *no appeal* from it *"such decision shall, without further proceedings, become the decision of the agency."*

It is therefore respectfully suggested that since the General Counsel did not file exceptions the Board was mandated by both of these statutes to enter the Intermediate Report as the Order of the Board and hence the case should have been dismissed in accordance with the Intermediate Report.

III.

The decision of the majority and its opinion is based upon a record which does not comply with the statutory requirements.

Section 9(d) of the National Labor Relations Act, as amended, provides:

> "Whenever an order of the Board is made pursuant to Section 10(c) it is based in whole or in part upon

facts certified following an investigation pursuant to Subsection (c) of this Section and there is a petition for the enforcement or review of such order, *such certification and the record of such investigation shall be included in the transcript* of the entire record required to be filed under Section 10(e) and 10(f), and thereupon the decree of the Court enforcing, modifying or setting aside, in whole or in part the Order of the Board, shall be made and entered upon the *pleadings, testimony,* and *proceedings set forth in such transcript.*" (29 U. S. C. A., Sec. 159(d).) (Emphasis supplied.)

The record before the Court reveals that no transcript of the *Hudson Sales* case, *77 NLRB 378,* has been included as part of the record submitted by the Board to the Court in pursuance to Section 10(e) of the National Labor Relations Act and hence the Court has acted without a full transcript before it and without a record which complies with the provisions of Section 10(e) of the National Labor Relations Act (29 U. S. C. A., Sec. 160 (e).)

IV.

The majority denies respondent's contention of equal protection of the law by resort to citations of *Liddon-White Truck Co.,* 76 NLRB 1181; *Bell-Wyman Company,* 79 NLRB 1424; *Harry's Cadillac-Pontiac Company,* 81 NLRB 1; *Midtown Motors,* 89 NLRB 1679; *Valley Truck and Trailer Co.,* 80 NLRB 444. Examination of these cited cases shows clearly that the companies involved in those cases had true receipts of shipments across state lines and not exclusively through local sources. In the instant case respondent received nothing from out of state and only its purchases, through the medium of the Hud-

son Sales Corporation, is an inconclusive connection with interstate commerce [I. R. 2-4]. Since this case was submitted, the Court of Appeals for the Tenth Circuit has issued a decision in *NLRB v. Shawnee Milling Company,* ..... F. 2d ..... 25 LRRM 2462 (dec. August 4, 1950), in which it clearly states that even though a company by its aggregate business may be said to effect commerce unless there is a separate showing that a local plant of such empire has a commerce connection, the Board is without right to exercise jurisdiction over the latter operation.

V.

The majority opinion seems to rest in part its decisive functions on the Board's alleged notification that respondent might file exceptions under the Board's Regulation 203.46 [D. 1-2]. With respect to the Board's attempt to require respondent to file exceptions to the "doubtful process of jurisdictional notice," it, in effect, promulgated a rule of procedure for this case only. Examination of the Board Regulation 203.46 conclusively shows that the application of that rule is only to Intermediate Reports of the Trial Examiner and not such situations as the Board has here invoked. Before the Board can promulgate and put into effect a rule it must first publish it in the Federal Register after having given opportunity to the public to contest such rules' entry.[4] None of that was done in this case and hence the Board's attempt to require the respondent to except to its administrative judicial notice procedure is without force and effect and respondent could and did completely disregard it and should not

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[4]49 Stat. 501; 44 U. S. C. A. 305; *Wyoming Coal Co. v. Krug,* 172 F. 2d .....; *Vincent v. U. S.,* ..... A. 2d 829; *Mogul Trans. Co. v. Larison,* ..... Ore. ....., 181 P. 2d 139.

now be held responsible for the inconclusive and unauthorized rule which the Board has specially promulgated for the government of this particular case.

Wherefore, respondent prays that the opinion of the majority be set aside, that the Court grant a further hearing in the matter and for such other and proper relief as to the Court seems just and proper.

Respectfully submitted,

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FREDERICK A. POTRUCH,
CARTER & POTRUCH,
JAMES M. NICOSON,
Attorneys for Respondent.

Certificate of Counsel.

James M. Nicoson respectfully certifies that he is one of the attorneys for respondent herein, that in his judgment the aforementioned Petition for Rehearing is well founded and that it is not proposed for the purpose of delay.

JAMES M. NICOSON,
Attorney for Respondent.